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No. 98-193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CONSOLIDATED RAIL CORPORATION
Petitioner,

v.

EDWARD L. WICKER, SR., SAMUEL D. WEAVER, THOMAS E. KLEINER, JOHN MCKEE, AND JOHN KALTENBRUNNER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Consolidated Rail Corporation, has consented to AAR's filing of a brief.[1] Respondents have refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great sig-

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[1] The letter expressing consent has been filed with the Clerk of the Court.

nificance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, which involves the validity of releases under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. The vast majority of FELA claims are resolved by way of settlement and release. General releases are frequently utilized to resolve claims alleging occupational diseases or when the employee is leaving the railroad in conjunction with the settlement, both of which are common occurrences in the railroad industry today. Therefore, the interpretation of releases under FELA is an important issue to all railroads.

When AAR appears before a court as *amicus curiae* in a FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of the impact of a case on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 1000 attorneys representing railroad companies in personal in-

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[2] *E.g., CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 380 (1996). All granting motion of AAR to participate as *amicus curiae*.

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

jury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts have displayed a tendency to interpret FELA expansively, even when such an interpretation is not warranted by the statute's language or intent. This problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant court decisions can have a far reaching impact. So long as Congress continues to keep FELA in place, railroads will avail themselves of their legal rights under that statute, and AAR will support those efforts.

In this case, the lower court invalidated releases signed by five employees of Petitioner, Conrail, in an opinion which calls into question the entire practice of settling FELA cases through a general release. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the railroad industry's line haul mileage, produce 93 percent of its freight revenues and employ 91 per-

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored the brief in whole or in part.

cent of railroad workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies on matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA), enacted by Congress in 1908 to provide a tort remedy for railroad employees injured on the job. FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as by the federal government for employees within its jurisdiction. The workers' compensation system eliminated the notion that recovery for a work-related injury should be conditioned on a showing of employer negligence, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.[2]

Each year thousands of claims and lawsuits are filed under FELA against AAR members. In recent years, the cost of FELA has risen to $1 billion, or more, annually, rendering it a significant cost component of operating a railroad.[3] By all accounts, railroads spend far more on FELA than is spent by private industry in general in payment of compensation to injured employees.[4]

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (calendar years 1992-1996) ("CLAIM & LITIGATION REPORT").

[4] Private industry other than railroads pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), whereas railroads pay nearly $2.00. 1996 CLAIM & LITIGATION REPORT, at 2-2. *See also* TRANSPORTATION RESEARCH BOARD, COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 7 (1994) ("Clearly, the higher and more extensive benefits in FELA create higher direct costs for railroads than the same injury would incur under alternative workers' compensation approaches.").

This case has a direct and substantial impact on the way railroads resolve numerous claims under FELA. The decision below, in which otherwise valid general releases were invalidated on the sole basis of § 55 of FELA, represents the second time in the last two years that a federal court of appeals has invoked § 55 in such a way. These decisions deny railroads the ability, available to all other employers, to rely on contract law principles in entering into releases. Instead, they must grapple with unique and conflicting rules regarding FELA releases which now apply in at least two circuits.

As a result of the confusion that now exists, not only will many railroads need seriously to consider using different releases in different parts of their operating territory, they will be unable, as a practical matter, to enter into many types of releases and will be vulnerable to suits from employees and former employees over claims they thought had been settled. AAR has a strong interest in having the confusion about the law of releases resolved, so that railroads and their employees can effectively and efficiently continue to settle FELA cases.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

SUMMARY OF THE ARGUMENT

The decision below, which is in conflict with a recent decision of the Sixth Circuit, call into serious question the ability of railroads to settle FELA cases through the use of general releases, a common and long-standing practice in the railroad industry. The court invalidated releases signed by five former Conrail employees as part of their settlement of FELA claims, on the grounds that § 55 of FELA barred releases of unknown claims. Moreover, the court held that in order to determine whether claims covered by a release were, in fact, known to both

parties, the words of the release would not be conclusive, but rather, a case-by-case, fact-intensive inquiry would be required to determine that question.

Thousands of FELA claims and suits are settled every year. General releases of the type invalidated by the court below are frequently utilized in settling claims alleging occupational illness and claims where the employee leaves the railroad's employment in conjunction with a settlement, both common events in the railroad industry today. In these cases, both employer and employee often have an interest in resolving all claims—even those which may (or may not) become manifest in the future—in one settlement agreement. Inasmuch as general releases, which otherwise would be valid and enforceable under contract law principles, are now subject to challenge as a result of the decision below, this practice will be severely hindered.

This Court has stated that issues arising under FELA must be determined according to uniform federal law. The need for uniformity is particularly acute with respect to the interpretation of releases. Without uniformity, railroads will need to craft different releases for use in different parts of their operating territory, and will never be sure whether they can "buy their peace" with employees by settling claims. Since two courts of appeals have issued conflicting rules, both of which appear to be at odds with this Court's ruling in *Callen v. Pennsylvania R.R.*, 352 U.S. 625 (1948), this Court should review the decision below and establish a uniform rule on the validity of FELA releases.

ARGUMENT

I. THIS COURT SHOULD END THE CONFUSION WHICH EXISTS AS A RESULT OF CONFLICTING DECISIONS REGARDING THE VALIDITY OF RELEASES OF FELA CLAIMS

A. The Decision Below Calls Into Question the Routine Practice of Settling FELA Claims With a General Release

The decision below throws into jeopardy the long-standing and common practice of resolving FELA claims by settlement and general release negotiated between employer and employee. Each year, thousands of FELA claims and suits are brought against the nation's railroads.[5] The vast majority of these cases are settled before going to trial, with the railroad paying a monetary settlement to the employee in exchange for being released from liability.[6] Thus, the process of compromise and release is an integral part of the administration of FELA.

The Court of Appeals for the Third Circuit held that § 55 of FELA [7] invalidates releases of claims for unknown risks, even when the release agreement is clear that the parties intended to cover such claims. Not only—as Petitioner has demonstrated—does this decision create a conflict in the circuits and further muddy the confused state of the law, it also establishes an unworkable and impractical rule with regard to FELA releases. This judicially created special rule for FELA releases will make it all

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[5] In 1996, 16,756 claims and 7,515 suits were brought against railroads under FELA. 1996 CLAIM & LITIGATION REPORT at 3-3.

[6] Of 5,226 FELA suits resolved in 1996, only 172 went to trial. 1996 CLAIM & LITIGATION REPORT at 3-1, 3-3.

[7] 45 U.S.C. § 55. This provisions voids "[a]ny contract, rule, regulation or device, whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability . . . ."

but impossible for railroads to "buy their peace" with employees through settlement and release of FELA claims.

In *Callen v. Pennsylvania R.R.*, 332 U.S. 625, 630-31 (1948), this Court held that "a release is not a device to exempt from liability" in violation of § 55, and established the principle that "releases of railroad employees stand on the same basis as the releases of others." Nonetheless, the court below invalidated releases signed by five former Conrail employees and, following on the heels of the Sixth Circuit, carved out an exception to this principle. Even more troubling, the exception carved by the Third Circuit differs from that now recognized by the Sixth Circuit, splintering the law on FELA releases.

In *Babbitt v. Norfolk & Western Ry.*, 104 F.3d 89 (6th Cir. 1997), the Sixth Circuit ruled that a release is valid under § 55 only if it purports to settle "a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown." *Id.* at 93.[8] The court below declined to adopt the *Babbitt* approach because "it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities" which they wished to settle immediately. *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 700 (3d Cir. 1998). However, rather than relying on the language of the release and principles of contract law to determine which claims the parties wished to settle, the court went on to rule that in order to determine the validity of a release, a fact-intensive process is required to determine exactly what the parties comprehended when they signed the release, i.e., did they really "know" about the risks they purported to settle? *Id.* at 701. Both cir-

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[8] *Babbitt* followed the Sixth Circuit's decision in *Wilson v. CSX Transp., Inc.*, 83 F.3d 742 (1996), in which the court held that a release of liability for "new" injuries contravened § 55.

cuits now embrace rules that not only are inconsistent with *Callen*, but also differ and conflict with each other.[9]

What makes these divergent and confusing decisions so troublesome for the railroad industry is the fact that they affect a daily function at all major railroads. Over 117,000 FELA claims and suits have been resolved through settlement during the five years between 1992 and 1996.[10] Claim departments in large railroads are constantly in the process of resolving FELA claims without resort to trial. During the course of negotiation of the terms of the settlement, the parties agree on the extent to which the employer is to be released from liability. Generally, the greater the scope of the release, the larger the sum of money the employee will receive in exchange.

The decision below not only invalidates any release of unknown claims (even if the parties intended to do just that), it does not even create a presumption of validity when the parties enumerate the risks from which the railroad is to be released. Railroads will not be able to rely on the specific language of the releases they have negotiated, no matter how clear and unambiguous, even where the employee was represented by counsel, as was the case here (and as usually is the case).[11] Instead, they must be pre-

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[9] In other locations, the validity of a FELA release would be governed by contract law, i.e., that absent fraud or mutual mistake, the release would mean what it says, and the employee would, in consideration of the settlement accepted, be barred from bringing a subsquent suit for any claim covered by the release. *See Satterfield v. CSX Transp., Inc.*, No. 93-002-R (W.D. Va. 12/22/93) (Upholding the validity of a release of "all unknown and unanticipated conditions . . ."); *Williams v. Norfolk Southern Corp.*, C.A. 1:92-545-HTW (N.D. Ga. 1/22/93) (Upholding the validity of a release of "known or unknown" claims.)

[10] During that period, 118,650 FELA claims and suits were resolved, with 1001 of the lawsuits going to trial. 1996 CLAIM & LITIGATION REPORT at 2-1, 3-1.

[11] The court suggested that even if the covered risks are specifically enumerated within the four corners of the release, employ-

pared to engage in a fact-intensive inquiry over the facts and circumstances surrounding the entered into of each and every general release. Since this issue will only come up when an employee is seeking to invalidate a release in order to bring a subsequent FELA case, the employee is certain to take the position that he or she was not aware of the risks enumerated in the release. The consequence will be a new, and time-consuming feature to FELA litigation, a prospect that surely will make the settling of FELA cases a more difficult undertaking.[12]

The District Court, which held that the question of the validity of the releases should be determined under the principles of contract law, hit the nail on the head when it concluded that barring the enforceability of releases "would lead to uncertainty in the future adjustment of FELA claims, hinder attempts at settlement by employers, and ultimately lead to more litigation." [13] As the District Court suggested, railroads will face a dilemma every time they enter into negotiations with an employee over whether a premium should be paid to buy peace with the employee through a release of all claims. A railroad, knowing it is doing so at the peril of having the release subsequently challenged and invalidated, may well be inclined to avoid this approach even though it would be in the interest of both the railroad and employee (who will lose the opportunity to obtain a larger up front payment).

Two characteristics of the railroad industry make the problem created by the court below particularly acute. The first is the proliferation of FELA claims for occupational

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ees still will be free to attack such language as "boiler plate, not reflecting his or her intent." 142 F.3d at 701. This is likely to prove an accurate prediction.

12 The Court of Appeals acknowledged the "elusiveness" of the "fact-intensive process" it was imposing. 142 F.3d at 701.

13 Petition at 48a.

diseases in recent years.[14] General releases play an important role in the settlement of these claims. Many occupational diseases are characterized by long latency periods and typically cannot be tied to a specific accident or event. Moreover, it is not uncommon for an employee to bring an occupational disease claim, and then, several years later to bring another such claim (or, to amend a complaint during the pendency of litigation to add a new claim).

Given these factors, it often is in the interest of both employer and employee to settle any and all occupational disease claims when the first claim is brought, even if it is not obvious at the time that the employee will ever manifest a new condition. The employee bargains for more money up front, to compensate for illness which may or may not occur in the future; the railroad knowing it has satisfied its obligation to the employee, buys its peace. Having done so, should a condition allegedly caused by past exposure to some agent in the workplace become manifest years later, neither party will need to be concerned about litigating over events, and producing evidence, years after the fact.

The second characteristic which heightens concern over the judicial attack on the validity of releases is the large number of employees that have left the railroad industry in

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14 Between 1989 and 1996, the railroad industry resolved approximately 100,000 claims and suits alleging various occupational diseases and conditions. These include claims alleging conditions caused by occupational exposure to asbestos or occupational exposure to noise, as well as carpal tunnel syndrome. CLAIM & LITIGATION REPORT (calendar years 1989-1996). During that period, suits alleging occupational disease accounted for half of all the FELA suits brought. *Id.* Even this number somewhat understates the total number of occupational disease cases as it does not include claims alleging exposure to diesel exhaust, silica dust, industrial solvents and other substances allegedly found in the workplace, on which AAR does not keep specific data.

recent years.[15] While many, perhaps most, of the employees who left the industry did not do so after settlement and release of a FELA claim, a significant number have.[16] Thus, there is a large pool of former railroad employees who may be in a position to assert a new FELA claim, challenging the validity of releases they previously signed, should they ever suffer from symptoms allegedly linked to their railroad employment. This is a troubling prospect to the railroad industry, to say the least.

B. Because Settling FELA Claims Is a Function That Is Undertaken Throughout All Railroads Nationwide, It Is Essential That a Uniform Rule Apply to the Validity of Releases

This Court has made clear that the validity of a release "must . . . be determined . . . according to uniform federal law." *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 362 (1952). Given the divergent approaches to questions about the validity of releases of FELA claims taken by the Sixth and Third Circuits, and other courts, this important requirement has fallen by the wayside.

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[15] In 1980, the year the railroad industry was partially deregulated, there were 458,994 employees of Class I railroads; in 1996, Class I employment had declined to 181,809. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, 1981 ed. at 57; 1997 ed. at 56. Class I railroads are those with revenues in excess of $250 million. 49 C.F.R. Pt. 1201, 1-1(a) (1997).

[16] A recent General Accounting Office study found that in about 13 percent of the FELA cases closed in 1994, the employee left the industry. GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED 54, n.4 (August, 1996). If this number holds for all the years from 1992 through 1996, there are approximately 15,000 former employees who left the industry in the context of settling a FELA claim during that period alone.

If ever there was an issue arising under FELA that cried out for uniform treatment, it is the effect of § 55 on the validity of general releases. As a result of the lack of uniformity of the treatment of releases, a release entered into with one employee at one location will be binding, whereas the same release entered into with another employee at another location will not be. The situation of Petitioner, Conrail, underscores this point. Conrail has been bought by two other large railroads, the Norfolk Southern (NS) and CSX Transportation (CSXT), in a transaction recently approved by the Surface Transportation Board. Once the purchasing railroads begin operating on the lines of Conrail, they will be operating in both the Sixth and Third Circuits, as well as in other parts of the country.[17] Unless the issue of the validity of releases is clarified, NS and CSXT may be forced to craft at least three different kinds of releases when negotiating FELA settlements with employees and former employees.

As in any situation where there is a lack of uniformity in the interpretation of FELA, the broad venue provisions of FELA will invite forum shopping by employees seeking to challenge releases they have signed. Under FELA, an employee may bring suit in either state or federal court, in any jurisdiction in which the railroad is doing business. 45 U.S.C. § 56. The enticing prospect of challenging a release to pave the way for a new lawsuit, which has been presented by the Third and Sixth Circuits, is likely to channel litigation to those areas.

This case represents an example of lower courts creating special rules for FELA claims based on the premise that FELA must always be given a construction that clears a path for the employee to collect damages.[18] As has been

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17 CSXT and NS already have extensive operations in the southeast and parts of the midwest.

18 In issuing its ruling, the Third Circuit stated that "[w]e recognize that this is a different (and more difficult) standard for

the case with other decisions,[19] the court below failed to recognize that FELA should be construed in accordance with general principles of common law that guide other negligence actions, except in those areas where Congress expressly altered those principles. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). Before the principles of contract law, which govern the interpretation of releases in other contexts, may be eschewed with regard to the interpretation of releases of FELA claims, this Court should determine if that really was the intent of Congress.

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railroad employers than is typical in non-FELA situations." 142 F.3d at 701.

[19] *See Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993) (Railroad employee may recover for negligent infliction of emotional distress so long as the railroad could have foreseen that its actions would cause emotional distress and the claim bears an india of genuiness.); *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993) (same); *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337 (2d Cir. 1996) (Railroad employee may recover for negligent infliction of emotional distress as a result of alleged exposure to asbestos even though he manifests no symptoms of any disease.). These decisions were all subsequently reversed by this Court.

CONCLUSION

On the basis of the foregoing, *amicus curiae* AAR respectfully submits that the petition for writ of *certiorari* to review the judgment of the Court of Appeals for the Third Circuit in this case should be granted.

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